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No. 02-1848

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER

Respondent.

On Petition for Writ of Certiorari to
The U.S. Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY

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INTRODUCTION

The City's Brief is an excellent illustration of a skilled lawyer doing his utmost to avoid, if not evade, the issues. The first Question Presented in the Petition shows this case turns on the fundamental fairness precept of 28 U.S.C. § 1441(a) that if a plaintiff could have filed suit in federal court, but chose to file in state court, the defendant may remove it. That statute is not even cited by the City.

That statute is critical. This Court held that a municipality sued for a regulatory taking of property has the right to remove that case from state to federal court (*City of Chicago v. International College of Surgeons*, 522 U.S. 156 [1997]), signifying — by the terms of 28 U.S.C. § 1441(a) — that the case could have initially been filed in federal court. The courts below refused to apply the teaching of *City of Chicago* and held that *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) compels landowner/plaintiffs to sue only in state courts.

The Eighth Circuit termed this dissonance between the Court's jurisdictional decisions an "anomalous . . . gap in Supreme Court jurisprudence" (App., p. 5), but declined to describe how to bridge that gap, saying that was "for the Supreme Court to say, not us" (App., p. 5).

Courts and commentators (Pet., pp. 23-26) had chafed under *Williamson* even before this Court decided *City of Chicago*. Resolution of the jurisdictional conflict between *Williamson* and *City of Chicago* cannot come from lower courts. It must come from this Court, as the Eighth Circuit said. Certiorari is sorely needed.[1]

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1 The City bears unwitting witness to that need when it notes that lower courts continue to apply *Williamson* after *City of*

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I
FACTUAL CORRECTIONS.

A few corrections need to be made to the City's factual recitation.[2]

First, the City is wrong when it asserts that "Kottschade's first and only attempt to obtain compensation for an alleged taking" was this lawsuit. (Opp., p. 1.) Mr. Kottschade first demanded that the City formally acquire the property and compensate him for the taking. The City did nothing. (Complaint, ¶ 24; AA 8.)[3]

Second, the City denies its conditions would reduce Mr. Kottschade's development from 104 homes to 26 and that the conditions would add nearly $70,000 in development costs to each home in a market where they sell for $125,000. (Opp., p. 24.) But those economic data are alleged in the complaint. (Complaint, ¶ 12; AA 5.) Besides, says the City, the ordinances requiring those conditions were in place before Mr. Kottschade purchased his land (Opp., p. 24), an argument defying this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

Finally, the City denies it violated *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1974) by refusing to explain the

(Opp., p. 4.) Until told to do otherwise, they will continue to do so.

2 To the extent the City indulges in charging Petitioner with "misrepresentation," a reference to U.S. Circuit Judge Thomas M. Reavley's article, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 Pep. L. Rev. 637 (1990), is appropriate.

3 AA refers to the Appellant's Appendix below.

nexus and proportionality of its conditions to the burdens of Mr. Kottschade's project. (Opp., p. 25.) The complaint quotes the City's letter as saying that "The facts . . . make it impossible to give you a definitive cost at this time for your share . . . ." (Complaint, ¶ 17, R. 6.) That "impossibility," however, did not stop the City from imposing financially ruinous costs on Mr. Kottschade.

Because the City chose to proceed by motion to dismiss, the facts properly before the Court are the ones alleged in the complaint. If the City wishes to contest the facts, the place to do that is at trial.

II
THE RIPENESS JURISDICTIONAL MUDDLE *IS* A SERIOUS PROBLEM, AND HUNDREDS OF INFORMED PEOPLE HAVE RECOGNIZED THAT.

The City says that there is no problem because only "Petitioner, advocates for special interests, and one distinguished professor disagree with the reasoning and consequences of *Williamson* . . . ." (Opp., p. 2.)

Wrong. See Pet., pp. 23-26, for courts and commentators criticizing "the reasoning and consequences of *Williamson* . . . ." Recently, an amicus brief was filed by the Hon. Steve Chabot, Chair of the Subcommittee on the Constitution, Committee on the Judiciary of the U.S. House of Representatives, stressing the need for a resolution of the *Williamson/City of Chicago* trap to enable Congress to effectively do its job. (Chabot, pp. 3, 4, 6.)

Beyond that, hundreds of Members of Congress are on record agreeing with the position urged by Mr. Kottschade. In the 105th Congress, H.R. 1534 (to allow property owners to sue in federal court directly) passed the House by a vote of 248-178. Its Senate companion, S. 2271, garnered a majority (52 Senators), but not enough to

invoke cloture. As described by Congressman Chabot, the 106th Congress tried again. H.R. 2372 prevailed in the House by 226-182. Again, the problem was the Senate, where a threatened filibuster prevented the majority from acting. Thus a Congressional majority recognizes the anomalous nature of existing law and wants to rectify it.

III
THERE IS NOTHING IN THE CITY'S "CENTURY OF THIS COURT'S OTHER PRECEDENTS" HOLDING THAT SUITS LIKE THIS MUST BE FILED IN STATE, RATHER THAN FEDERAL, COURTS.

The City argues that *Williamson* merely continued precepts "articulated over a century ago." (Opp., p. 15) But each cited case stands only for the proposition that property owners have a right to sue for a taking of their property. However, ***all of those cases were filed in federal court***, and ***not one of those cases says that such suits must be filed in state courts***. Indeed, they couldn't have been filed in state court. (See cases at Pet., p. 11, fn. 5, in which landowners sued local government agencies for just compensation in federal courts before *Williamson* forbade it.)

Williamson has been around for 18 years, not more than a century, as the City suggests. Harmonizing it with *City of Chicago* will neither revolutionize the law nor require reconsideration of any of those century-old cases.

IV
IF IT IS TO BE VIEWED RATIONALLY, *CITY OF CHICAGO* MUST IMPACT *WILLIAMSON*, AND THEREFORE IT NEEDS TO BE DEALT WITH.

The City's insistence that the issue here is simple (e.g., Opp., p. 1) does the Court a disservice. Everyone but the City agrees that regulatory taking ripeness law is confusing. (See Pet., pp. 23-26.) *City of Chicago* increased the difficulty and needs to be grappled with.

First. *City of Chicago* gives cities the right to remove regulatory taking cases to federal court under 28 U.S.C. § 1441(a). That is its core holding. It is no "misrepresent[ation]" (Opp., p. 20) to say so. Perhaps the City also thinks Justice Ginsburg "misrepresent[ed]" the upshot of an opinion she saw as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180) because:

> "[a]fter today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (*City of Chicago*, 522 U.S. at 175; Ginsburg, J., dissenting.)

Second. Ripeness is jurisdictional. (*Forseth v. Village of Sussex*, 199 F.3d 363, 368 [7th Cir. 2000].) A court either has it or not. If, after *City of Chicago*, U.S. District Courts have jurisdiction over regulatory taking cases when removed by defendants then, under 28 U.S.C. § 1441(a), plaintiffs must be able to sue there first.[4]

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[4] The City drags a red herring through its brief by saying that only "ripe" cases may be removed. (Opp., pp. 3, 7, 21.) First, as the Eighth Circuit noted, Mr. Kottschade had exhausted his administrative remedies (App., p. 5), thereby satisfying the

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Third. The City says it was other claims pled by the Surgeons (due process and equal protection) that provided jurisdiction, which "was present . . . **in spite of**, not because of, the plaintiff's inclusion of a federal takings claim." (Opp., p. 21; emphasis in original.)

Wrong. Ripeness is based on the complaint, and the Surgeons' complaint alleged a taking. (*City of Chicago*, 522 U.S. at 160.) Besides, *Williamson's* ripeness rules have been applied to due process and equal protection claims. (Pet., p. 8, fn. 4.) If the taking claim wasn't ripe, the same held true for the other federal claims, and it is no "misrepresent[ation]" (Opp., p. 20) to say so.

Fourth. That courts have applied or referred to the second prong of *Williamson* since *City of Chicago* (Opp., pp. 4-5, 9, 18) is not decisive, as the latter's impact was neither raised nor discussed. With respect to this Court, *Williamson* was not involved in *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003), but mentioned as part of the legal background. It was also in the background of *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) because California's refusal to recognize a compensatory remedy for regulatory takings excused compliance with *Williamson*. Any other comment was merely historical dictum. The relationship between *Williamson* and *City of Chicago* has been squarely raised and briefed here — but not in the City's cited cases.

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first ripeness prong. Second, the only "unripe" thing was not suing in state court. But the Eighth Circuit also noted that Mr. Kottschade was "justly" concerned he would be precluded from suing in federal court (App., p. 6), as so many had been before (see Pet., pp. 17-18). That's what this Petition is all about. Besides, this case is as ripe as *City of Chicago*.

In sum, *City of Chicago* has multiplied the confusion already present in regulatory takings. It cannot be that it had no impact whatever on *Williamson*.

V
NOW IS AN APPROPRIATE TIME TO REVIEW THE WORKINGS OF A COURT CREATED RULE THAT ISN'T WORKING.

The City says there is no reason to review the workings of *Williamson* — alone or with *City of Chicago*. (Opp., p. 11 et seq.) "Williamson's second prong has not 'proven to be intolerable simply in defying practical workability.' [Citation.]" (Opp., p. 12.) Nor have there been legal or constitutional developments to prompt reexamination. (Opp., p. 11.)[5] Leave *Williamson* alone, says the City, and don't worry about *City of Chicago*.

"Bogus defenders of *stare decisis*" — that's what California's late Chief Justice Roger Traynor would have called the City's counsel. In his words:

> "At the slightest sign that judge-made law may move forward these bogus defenders of *stare decisis* conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore of the year before much too long ago." (Roger Traynor, *No Magic Words Could Do It Justice*, 49 Calif. L. Rev. 615, 621

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5 Perhaps the majority of both Houses of Congress thinking this problem is in need of a solution might be such a "development."

[1961].)

There are serious problems with *Williamson*, either alone or with *City of Chicago*. For the City to say that, in practice, this has not "proven to be intolerable simply in defying practical workability" shows the parochial view of a litigant that gains everything and loses nothing in the *status quo*. The point of every court and scholar quoted at Pet., pp. 23-26 is that this test is met — in spades.

And if a change in the constitutional framework is the key (Opp., p. 11), then *City of Monterey*'s holding (14 years after *Williamson*) of a 7th Amendment right to a federal court jury trial surely qualifies.[6]

One doesn't cast away precedents lightly. However, history shows that when the scholarly community has been critical of its decisions,[7] when application of a precedent has produced a rule which "stands only as a trap for the unwary,"[8] when necessary to clarify the implications of earlier decisions in light of more recent history,[9] when

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6 The City's brief does not accurately reflect Minnesota practice when it asserts that a jury trial would be available there. (Opp., p. 19.) Although Minnesota law permits a jury to make certain fact determinations, the ultimate decision on liability is made by the trial judge. Where the *City of Monterey* jury decided liability as a question of *fact*, that issue is held in Minnesota to be an issue of *law* for the judge. (*Thomsen v. State*, 170 N.W.2d 575, 580-581 [Minn. 1969].) Minnesota thus does *not* provide as much protection as the 7th Amendment.

7 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

8 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

9 *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

decisions of this Court are "if not directly" conflicting, "are so in principle,"[10] or when "the answer suggested by our prior opinions is not free of ambiguity,"[11] this Court has reviewed its prior decisions. "In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance." (*Continental*, 433 U.S. at 48-49.)

All of those factors were described in the Petition and ignored by the City. Certiorari is amply warranted.

CONCLUSION

This is a 42 U.S.C. §1983 case, although you couldn't tell it from the City's brief. In examining its plain words this Court has been clear: the statute provides a ***federal*** remedy in ***federal*** court to protect citizens against unconstitutional local government actions impairing their ***federal*** rights. (E.g., *Mitchum v. Foster*, 407 U.S. 225, 239 [1972]; *Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]; *Felder v. Casey*, 487 U.S. 131, 141 [1988]; cases cited at Pet., pp. 27-28.) To accomplish that, Congress intended to "throw open the doors of the United States courts" to those deprived of constitutional rights "and to provide these individuals ***immediate access to the federal courts*** . . . ." (*Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 [1982]; emphasis added.)

Forcing property owners to sue in state courts to protect their federal constitutional rights does not comport with 42 U.S.C. § 1983. Nor does it comport with the 7th Amendment, which guarantees a jury trial in federal court

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10 *Funk v. United States*, 290 U.S. 371, 374 (1933).

11 *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

but not in state courts.

All this is exacerbated and magnified by the impact of *City of Chicago*. There is no justification for making a plaintiff's right to a federal forum depend on the whim of the defendant in deciding whether to remove a case. It is a matter of both jurisdiction and fairness. Either they exist or they don't. But the rule must be the same for both sides.

Mr. Kottschade prays that certiorari be granted to address the important issues raised here.

Respectfully submitted,

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